Supreme Court, U.S.
FILED

09-690 DEC 10 2009

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No. _____

In The
Supreme Court of the United States

BELAL AHMED CHAUDHARY,
Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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December 10, 2009

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QUESTIONS PRESENTED

Did the Second Circuit Court of Appeals Deny the Petitioner his fundamental rights to due process under the Fifth Amendment by affirming the decisions of the Board of Immigration Appeals and the Immigration Judge in an egregious departure from the accepted and usual course of judicial proceedings?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Belal Ahmed Chaudary asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Belal Ahmed Chaudhary, v. Holder*, Docket No., 08-3900 (2d Cir. 2009), is attached to this petition as **Appendix A**. The agency opinions issued by the Immigration Judge, then adopted and affirmed by the Board of Immigration Appeals (hereinafter "Board" or "BIA"), *In re Belal Ahmed Chaudhary*, No. 073-577-947 (BIA July 14, 2008), are attached to this petition as **Appendices B and C**. The decision of the United States Court of Appeals for the Second Circuit denying the petition for rehearing is attached to this petition as **Appendix D**.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment denying the timely submitted petition for rehearing on September 18, 2009. The Order denying the petition for rehearing is attached hereto as **Appendix D**. The Court of Appeals denied Chaudhary's timely petition for review of the decision of the Board of Immigration Appeals on August 12, 2009. The order denying review of the agency appeal is attached hereto as **Appendix A**. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprive

Mr. Chaudhary of his rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person...shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the abuse of discretion standard, as a means of reviewing the Board of Immigration Appeals' denial of Petitioner's motion to reopen. The Circuit Court in applying the abuse of discretion standard to review the matter of Belal Ahmed Chaudhary misapplied the standard by failing to review the record in a cumulative manner, and further failed to acknowledge that the Immigration Judge and the BIA relied on an improper standard for evaluating Mr. Chaudhary's supporting evidence in their decisions in clear violation of Second Circuit precedent. The Court of Appeals' decision is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mr. Chaudhary's Fifth Amendment rights. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decisions below.

Mr. Chaudhary is a native and citizen of Bangladesh who last entered the United States on September 10, 1991.

In Bangladesh, Mr. Chaudhary was an active member of the Jatiya political party, ("JP"). He first became politically active when President Hussain Mohammed Ershad came to power in 1982, and he remained active until leaving for the United States in 1991. In 1984, President Ershad formed the political party, "Jonodal," in order to bring democracy and economic freedom to Bangladesh. In 1986, President Ershad dissolved the Jonodal party and established the Jatiya Party. As a result, Petitioner became a member of the Jatiya Party.

He dedicated his time, energy and money to the Jatiya Party. As an active party member, Petitioner organized rallies, called and conducted meetings and was a major party financier. Petitioner used to motivate people to support the party and donate funds to the cause.

At that time, opposition parties emerged. Jointly, the Bangladesh Nationalist Party (BNP) and Awami League along with fundamentalist political parties emerged and began acting violently until President Ershad was forced from power.

On December 6, 1990, President Ershad transferred power to the interim government in an attempt to save democracy; however, the interim government supported the opposition parties and began persecuting Jatiya Party leaders and supporters. Shortly thereafter, former-president Ershad was jailed and by February 27, 1991, an

election was held and with the help of the fundamentalist group, Zamat-e Islam, of the BNP came to power.

Once the BNP became the ruling party, they regarded the Jatiya Party as a rival and a threat to its despotic rule. As a result, the corrupt regime began to repress Jatiya Party workers, leaders and family members, including Petitioner. On February 20, 1991, the Jatiya Party called a procession, during which they demanded Ershad's release.

Marching towards the Zindabazar point, Petitioner and the other marchers came upon a group of political workers from the Awami League and the BNP who were fighting amongst themselves. Petitioner and his fellow marchers attempted to change course, but suddenly, police came and began shelling tear gas and beating all present.

Petitioner was arrested and shoved into a van. At the police station, police cursed at Petitioner and mercilessly beat him with a stick. Petitioner's wife hired an attorney who was able to arrange for Petitioner's release. A judge released Petitioner on bail and ordered him to appear for a later court date. Fearing being subject to further persecution, Petitioner did not appear at his scheduled hearing and the charges were dropped, due to a failure to prosecute.

Subsequently, on March 23, 1991, another Jatiya Party march was organized calling for the release of former President Ershad. This relatively small marching group gathered at party headquarters and began marching with party banners and flags. The

group, of which Petitioner was a part, was supposed to end up at the Press club where it could convene a meeting before members dispersed for their homes. However, when the procession reached the Sylhet High Court area, a large group of BNP workers armed with hockey sticks, wooden bars and knives, along with a large group of police officers, attacked Petitioner's group. Once again, Petitioner's group was surrounded by BNP members and police officers.

Police officers arrested Petitioner, handcuffed him, slapped him multiple times and then pushed him into a police van. Once at the police station, Petitioner was punched and kicked with boots and struck with a rifle butt. Petitioner was deprived of food or water while detained and upon requesting a drink of water, the captors supplied him with dirty water in a broken glass. The next day, Petitioner was sent to court where he was sentenced and sent to jail.

For fourteen days, he was abused, beaten with sticks, tied to a pole and whipped mercilessly. As a result of the beatings, Petitioner was unable to stand under his own strength. Petitioner's attorney worked for his release and on April 7, 1991, he was freed with an order not to leave the area without a court order or police acquiescence and given a notice to appear. Upon his release, Petitioner's wife took him to a doctor, where he was treated for ten days. Once again, Petitioner did not appear for his court appearance in order to avoid further torture and the charges were dismissed.

Petitioner continued his party activities. On June 26, 1991, the Jatiya Party organized and lead a demonstration condemning the atrocities of BNP

workers and the police. The march was peaceful until it reached the Court, where a large group of BNP workers attacked the protestors with hockey sticks and wooden bars and hurled stones and bricks at the peaceful procession.

Petitioner began to run from the attack; his mouth and nostrils bleeding from the beating. BNP workers gave chase and ran behind Petitioner, who was lucky enough to get away. Many Jatiya Party members were badly injured in the attack. Petitioner arrived at a friend's house and once inside, his friend called a doctor to treat Petitioner for injuries.

As Petitioner was treated at his friend's house, police and BNP workers went to Petitioner's house and inquired about his whereabouts. Petitioner's wife and family members were abused and threatened by the police for failing to tell them Petitioner's location. Petitioner decided to leave the area and fled to Dhaka for safety.

Unfortunately, Petitioner soon learned that even Dhaka was unsafe as police and BNP workers continued to look for him. The police and BNP workers looked for Petitioner in his relative's and friend's houses; Petitioner could not find a safe place to hide. Petitioner contacted his party leaders for advice, but most of them were incarcerated; those he spoke with advised him to leave while he still had the chance. Petitioner took the advice and left as soon as possible.

Petitioner managed to obtain a travel document through a broker and left Bangladesh on September 2,

1991. He finally reached the United States on September 10, 1991 and entered without inspection.

On September 10, 1994, Mr. Chaudhary filed an application for asylum and withholding of deportation. On May 11, 1998, the Immigration Judge denied Mr. Chaudhary's applications.

On August 4, 2002, Petitioner's wife informed him that BNP members visited his home in search for him. While there, the BNP members beat his wife and his daughter, destroyed the home's doors, windows and valuables, and threatened that if they caught Petitioner, they would kill him.

On January 10, 2003, BNP members came to the house in search of Petitioner, abused and beat his wife and set fire to the house. The next day, the BNP members returned and set fire to the valuables. On February 5, 2003, an armed group of BNP members returned to the house, searched it for Petitioner, broke the furniture, pushed his wife to the floor and set fire to the outside room of the house.

On February 17, 2003, BNP workers implicated Petitioner in a fraudulent lawsuit. Even though Petitioner was not in Bangladesh, the Court issued a warrant for Petitioner's arrest. Police visited Petitioner's house many times in search of Petitioner.

Petitioner filed his first motion to reopen his deportation proceedings on June 20, 2003. The motion was denied by the Board of Immigration Appeals on August 6, 2003.

On September 4, 2003, Mr. Chaudhary filed his second motion to reopen on the basis of changed country conditions. In particular, his motion was based on three pieces of previously unavailable evidence: (1) a warrant for his arrest in Bangladesh; (2) a court order from Bangladesh; and (3) a letter from his daughter. Said motion was denied by the Board of Immigration Appeals on February 2, 2004 because Petitioner failed to provide authenticated documents.

Mr. Chaudhary appealed the BIA's denial of his second motion to reopen to the Second Circuit Court of Appeals, and on January 3, 2006, this the Second Circuit remanded the matter for further consideration, holding that the Board of Immigration Appeals erred in denying Petitioner's petition for review without discussing why it would be reasonable to believe that Petitioner could obtain authenticated documents.

The BIA remanded the record of Mr. Chaudhary's case to the IJ to address the issue of whether it is reasonable to expect the subject documents to be authenticated.

After a hearing pursuant to the Board of Immigration Appeals' remand order, the Immigration Judge denied Mr. Chaudhary's Motion to Reopen without ever answering the question of whether it is reasonable to expect the documents in question be authenticated by Mr. Chaudhary.

Petitioner appealed the Immigration Judge's decision to the Board of Immigration Appeals. The Board of Immigration Appeals dismissed the appeal, even though they acknowledged that the Immigration Judge's decision did not meaningfully address the

central question at issue, which is "whether it is reasonable to expect the [Petitioner] to authenticate the arrest warrant and court order submitted with his second motion to reopen." See **Appendix B**.

Mr. Chaudhary then filed a Petition for Review with the Second Circuit. The Second Circuit denied the petition for review even though they acknowledged that the Immigration Judge and Board of Immigration Appeals did not address the question central to the previous Second Circuit remand order.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case was an egregious departure from the accepted and usual course of judicial proceedings. They affirmed the decisions of the BIA and IJ although both failed to render a judgment on the motion to reopen submitted by Petitioner Belal Ahmed Chaudhary under the proper standard of proof.

THE SECOND CIRCUIT ERRED IN FINDING THAT THE BIA DID NOT ABUSE ITS DISCRETION BY DENYING PETITIONER'S MOTION TO REOPEN.

It is respectfully submitted that certiorari should be granted in this case because the Second Circuit substantially erred by relying on and upholding the decision of the Board of Immigration Appeals, denying the Petitioner's petition for review and in failing to find that the Board of Immigration Appeals' denial of the Petitioner's motion to reopen was an abuse of discretion.

Decisions of the Board of Immigration Appeals that are reviewed by the Courts of Appeal must undergo a two part analysis. First, the Court must review, *de novo*, the conclusions of law reached by an agency, to determine whether the agency correctly applied the appropriate law. *See* Twum v. INS, 411 F.3d 54, 58 (2d Cir. 2005); Barreto-Clara v. U.S. Attorney General, 275 F.3d 1334, 1338-39 (11th Cir. 2001); Mardones v. McElroy, 197 F.3d 619, 624 (2d Cir. 1999). If, in fact, there is no question as to the conclusion of law, then the Court must review the Board of Immigration Appeals' decision to determine if the Board's decision constituted an abuse of discretion. *See* Gbaya v. United States A.G., 342 F.3d 1219 (11th Cir. 2003); Al Najjar v. Ashcroft, 257 F.3d 1262, 1302 (11th Cir. 2001). An abuse of discretion can be found when the agency's decision is determined to have been arbitrary, capricious, or in contravention of its own precedent. *See* Abdi v. U.S. Attorney General, 430 F.3d 1148 (11th Cir. 2005); Ke Zhen Zhao v. Department of Justice, 265 F.3d 83, 97 (2d Cir. 2001).

The Second Circuit, in its decision denying and dismissing Petitioner's petition for review, relied upon the erroneous findings of the BIA to conclude that there was no abuse of discretion on the part of the agency. *See* **Appendix A**. Petitioner contends that the Board's denial of his motion to reopen was in fact an abuse of discretion as defined by applicable precedent, and this Court's upholding of that decision constituted substantial error.

In the instant case, the Board of Immigration Appeals abused its discretion by declining to reopen Petitioner's case based on his submission of new previously unavailable material evidence, and changed

country conditions in support of the motion. Petitioner contends that the Second Circuit determination that the BIA did not abuse its discretion, was erroneous. *See* Chaudhary v. Holder, 08-3900-ag, August 12, 2009, (2d Cir.), p. 3, attached hereto as Exhibit A. Petitioner's motion to reopen was based in part on previously unavailable material evidence and changed country conditions, which are exceptions to the regulatory time deadline.

The BIA initially rejected Mr. Chaudhary's motion to reopen on the basis that the subject documents were not authenticated. This rejection constitutes a rejection for want of corroboration. Subsequently, this Honorable Court remanded the case to the BIA for further consideration of *why* it would be reasonable that Petitioner could obtain authenticated documents. Thereafter, the BIA remanded the case to "allow the parties to address the issue of *whether* it is reasonable to expect that the documents in question could be authenticated." The authentication issue was never meaningfully addressed.

Ultimately, neither the BIA nor the IJ provided any explanation of the basis upon which they questioned the authenticity of Petitioner's documents. *See,* Cao v. U.S. Dep't of Justice and Gonzales, 421 F.3d 149 (2d Cir. 2005) [Where the IJ suspected the authenticity of the applicant's documents, the IJ provided specific reasons raising her doubt that bore a direct relationship to the subject documents]; *See also,* Borovikova v. U.S. Dep't of Justice, 435 F.3d 151 (2d Cir. 2006) [in challenging the authenticity of a document, the IJ based her suspicion on an INS employee working at the United States Embassy in the applicant's home country]. Moreover, neither the BIA

nor the IJ clearly indicated what it was that Mr. Chaudhary should have done to satisfactorily authenticate the documents; aside from the BIA's comment regarding obtaining an affidavit from his wife's attorney that was made *after* the IJ's denial. *See,* Cao v. Gonzales, 428 F.3d 391 (2d Cir. 2005) [finding IJ erred in rejecting petitioner's document based on petitioner's failure to authenticate it, noting that the IJ did not indicate what could have been done to authenticate the document]. Thus, the BIA erred in upholding the IJ's decision on the grounds that neither the BIA nor the IJ provided specific reasons for their suspicions of the subject documents and for their failure to timely indicate what would have constituted satisfactory authentication.

The BIA decision dismissing Petitioner's appeal went on to justify its decision to afford little weight to the documents stating,

> the respondent testified that his wife asked her lawyer to authenticate the documents, and the lawyer confirmed their authenticity. If that is the sole means by which the respondent tried to authenticate the documents, it is reasonable to expect the respondent to submit an affidavit from the lawyer explaining his conclusions and the bases therefor. No such affidavit was provided. Under these circumstances, the unauthenticated records carry little weight and do not provide an adequate basis for showing changed country conditions sufficient to warrant reopening. Accordingly, the appeal will be dismissed. See **Appendix B**.

Petitioner respectfully contends that this discussion, regarding the sufficiency of Petitioner's attempt to authenticate his documents, contradicts the BIA's earlier decision to presume that "authentication pursuant to 8 C.F.R. § 1287.6 is not reasonably feasible."

In effect, the BIA first decided that *any* authentication was infeasible and subsequently stated that *Petitioner's* authentication was insufficient. The reason that the BIA initially granted the IJ considerable flexibility in determining authenticity was because it decided that authentication was not feasible. Thus, subsequently taking into account the Petitioner's inability to affectively authenticate the documents and allowing that inability to impact the documents' weight is inherently contradictory and shows the BIA's attempt to take two bites at the apple.

Ultimately, the BIA erred by failing to address the central issue of "why it would be reasonable that he could obtain authenticated documents," and subsequently denying Petitioner's appeal requesting an adequate opportunity to do so.

There is no question that the documents submitted in support of a motion to reopen would have provided clear proof of changed circumstances such that there would be an exception to the time and numeric requirements for motions to reopen before the Board of Immigration Appeals. The Second Circuit's refusal to meaningfully address this issue has prejudiced Mr, Chaudhary to such an extent that that it effectively deprives him of his rights as granted under the Constitution of the United States.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHE & ASSOCIATES, P.C.

BY:

CHARLES CHRISTOPHE, Esq.*
2 Wall Street, 8th Floor
New York, New York 10005
212.344.3800

*Counsel of record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

08-3900-ag NAC

[Filed August 12, 2009]

BELAL AHMED CHAUDHARY,
Petitioner,

v.

ERIC H. HOLDER JR.,*
UNITED STATES ATTORNEY GENERAL,
Respondent.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder Jr. is automatically substituted for former Attorney General Michael B. Mukasey as respondent in this case.

OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of August, two thousand nine.

PRESENT:

WILFRED FEINBERG,
BARRINGTON D. PARKER.
RICHARD C. WESLEY,
Circuit Judges.

FOR PETITIONER: **Charles Christophe, Esq., New York, New York.**

FOR RESPONDENT: **Michael F. Hertz, Acting Assistant Attorney General, Civil Division; David V. Bernal, Assistant Director; Jesse M. Bless, Trial Attorney, Office of Immigration Litigation, U.S. Department of Justice, Washington, D.C.**

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Petitioner Belal Ahmed Chaudhary, a native and citizen of Bangladesh, seeks review of a July 14, 2008 order of the BIA denying his motion to remand and affirming the December 14, 2006 order of Immigration Judge Barbara A. Nelson denying his motion to reopen. In re Belal Ahmed Chaudhary, No. A073 577 947 (B.I.A. July 14, 2008), aff'g No. A073 577 947 (Immig. Ct. N.Y. City Dec. 14, 2006). We assume the parties' familiarity with the underlying facts and procedural history in this case.

We review the denial of a motion to reopen for abuse of discretion. See Cekic v. INS, 435 F.3d 167, 170 (2d Cir. 2006). Under 8 C.F.R. § 1003.2 (c) (2), an applicant may file only one motion to reopen his

proceedings and that motion must be filed within 90 days of the entry of the final decision in the underlying proceeding. However, an applicant may be excused from compliance with the time and numerical limitations on motions to reopen if he submits evidence establishing "changed country conditions arising in the country of nationality . . . ." 8 U.S.C. § 1229a(c) (7) (C) (ii); 8 C.F.R. § 1003.2(c) (3) (ii). Such a motion shall not be granted unless it appears that the evidence offered in support of the motion "is material and was not available and could not have been discovered or presented" at the previous hearing. 8 C.F.R. § 1003.2 (c) (1).

In ths case, the agency did not abuse its discretion in denying Chaudhary's motion to reopen. See Cekic, 435 F.3d at 170. The BIA did not err in finding that, even if it was not reasonable to expect that Chaudhary could authenticate the documents that he submitted in support of his motion, the IJ was nonetheless justified in according the documents little to no weight. The unchallenged adverse credibility determination in the underlying proceedings, as well as Chaudhary's inconsistent and implausible testimony regarding the documents he submitted provided sufficient grounds for the IJ to decline to credit the documents. See Oin Wen Zheng v. Gonzales, 500 F.3d 143, 147 (2d Cir. 2007).

In addition, the BIA did not abuse its discretion in denying Chaudhary's motion to remand. See Li Yong Cao v. U.S. Dep't of Justice, 421 F.3d 149, 157 (2d Cir. 2005). Chaudhary argued to the BIA that remand was required because the IJ had based her decision on confused testimony that resulted from interpreter error. The BIA reasonably found that the IJ had ample

grounds for declining to credit Chaudhary's documents even if Chaudhary's confused testimony was disregarded. Accordingly, remanding Chaudhary's case on that basis would be futile. and the BIA did not err in denying the motion.

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, the pending motion for a stay of removal in this petition is DISMISSED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez

APPENDIX B

[SEAL]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

CHEN AMY Y. ESQ.
2 WALL STREET, 8TH FLR.
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Office of the District Counsel/NYC
26 Federal Plaza, Room 1130
New York, NY 10278

Name: CHAUDHARY, BELAL AHMED

A096-434-967

Date of this notice: 7/14/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73 577 947 - New York, NY

Date: JUL 14 2008

In re: BELAL AHMED CHAUDHARY

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Amy Y. Chen, Esquire

APPLICATION: Reopening

This matter was last before the Board on March 31, 2006, when we remanded the record to the Immigration Judge "to allow the parties to address the issue of whether it is reasonable to expect that the documents in question could be authenticated." This issue arose after the United States Court of Appeals for the Second Circuit vacated the Board's February 2, 2004, denial of the respondent's second motion to reopen. The Second Circuit held that the Board erred by denying the motion to reopen based solely on the lack of authentication of his supporting documents without explaining why it would be reasonable that the respondent could obtain authenticated documents. The respondent appeals the Immigration Judge's

December 14, 2006, decision on remand, and has also filed a motion to remand. The appeal will be dismissed, and the motion to remand will be denied.

The Immigration Judge's decision, and the testimony and evidence presented on remand, do not meaningfully address the central question at issue, which is whether it is reasonable to expect the respondent to authenticate the arrest warrant and court order submitted with his second motion to reopen. Accordingly, we will presume that authentication pursuant to 8 C.F.R. § 1287.6 is not reasonably feasible. In such circumstances, the Immigration Judge has considerable flexibility to determine the authenticity of documents from the totality of the circumstances, including the respondent's credibility. *Li v. Mukasey,* Docket No. 04-3985-ag, 2008 US. App. LEXIS 12638 (2d Cir. June 13, 2008). In this case, the Immigration Judge's prior adverse credibility finding, in conjunction with the respondent's implausible testimony that he received the documents in approximately June 2003 (when they are dated August 2003) is sufficient to support the conclusion that they should be given little weight. Additionally, the respondent testified that his wife asked her lawyer to authenticate the documents, and the lawyer confirmed their authenticity. If that is the sole means by which the respondent tried to authenticate the documents, it is reasonable to expect the respondent to submit an affidavit from the lawyer explaining his conclusions and the bases therefor. No such affidavit was provided. Under these circumstances, the unauthenticated records carry little weight and do not provide an adequate basis for showing changed country conditions sufficient to

warrant reopening. Accordingly, the appeal will be dismissed.

The respondent moves to remand because he claims another ground cited by the Immigration Judge for discrediting the documents was created by mistakes by the interpreter. The respondent claims that the interpreter failed to distinguish between "arrest warrant" and "court order", and instead referred to the documents collectively as "your documents." He claims this is the reason he testified that he had never seen the original court order, when, as the Immigration Judge pointed out, the original is in the record. We will deny the motion for two reasons. First, as explained above, we find an adequate basis for rejecting the documents without regard to the confusion about whether the respondent had seen the original court order. Second, the record does not support the respondent's claim that the confusion was caused by interpreter error. The Immigration Judge gave the respondent an opportunity to explain the discrepancy, and he asserted that he thought he had been asked about the arrest warrant (of which there is only a copy), not the court order. This explanation is implausible, as the respondent's attorney had already extensively questioned him about the arrest warrant, and then moved on to the court order, specifically directing the respondent's attention to "the order from the Lured [sic: Learned] Cognizable Court, no. 2 in Silad [sic: Sylhet]." December 14, 2006, Tr. at 28. Even if the interpreter had translated "order" as "document" in this phrase, the respondent's attorney's reference to the name of the issuing court was a sufficient indication that he was asking about the court order. We thus see no basis for another remand.

For these reasons, the appeal will be dismissed, and the motion to remand will be denied.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

/s/
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT
New York, New York

File No.: A 73 577 947

[Filed December 14, 2006]

In the Matter of	)
	)
BELAL AHMED CHAUDHARY,	)
	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGE: Section 241 (a) (1) (B) of the Immigration and Nationality Act.

APPLICATIONS: Relief Motion to Reopen

ON BEHALF OF RESPONDENT:

Alexander Milton
Law Office of Christopher
and Associates

ON BEHALF OF DHS:

Michael Falcone

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Bangladesh, who applied for asylum before the Court, and has had a rather long procedural history in this case. The Court will briefly summarize that testimony.

As indicated, the respondent applied for asylum on May 11, 1998. The respondent had a hearing before this Court. His application for asylum was denied, the Court having found his testimony not to be credible or reliable, because of inconsistencies and other matters. The respondent filed an appeal to the Board of Immigration Appeals and on March 3, 2003, the Board dismissed the appeal and granted voluntary departure until April 2, 2003.

On March 3, 2003, well after the respondent's voluntary departure had expired, the respondent filed a Motion to Reopen, based on changed country conditions. On August 6, 2003, the BIA dismissed an appeal finding that the motion was late and there had been no changed circumstances.

The respondent filed an appeal to the Second Circuit Court of Appeals on January 3, 2006. The Second Circuit reversed the Board and remanded to the Board. Then in March of 2006, the Board remanded the case to the Court for further proceedings and a decision. The BIA, in its decision, stated that they would "remand the record to allow the parties to address the issue of whether it is reasonable to expect

that the documents in question could be authenticated." Thus, the matter is on before me to decide the Motion to Reopen, which has yet not been decided.

The respondent filed this motion with certain documents. They include a warrant of arrest, a court order, and a letter from his daughter. The Board had denied the motion because the documents were unauthenticated. The Second Circuit found that denying the Motion to Reopen solely because of his failure to file educated documents was in error.

The respondent has submitted additional documents, since he filed his motion. They include affidavits from his mother, neighbors, friends, fellow members of the Jatiyo Party, a doctor, a lawyer. He has also offered background material.

The respondent has also testified. The respondent told the Court that his wife had retained an attorney in Bangladesh because a case had been brought in his name. The respondent has never met this attorney. He says that his family had difficulties after he left, hooligans and the police were looking for the respondent. He referred to one incident in August of 2002, where his wife, child and mother were at home. He said that neighbors were witnesses as well and they have submitted documents.

The respondent was asked if he made any attempt to authenticate the two government documents, which he has offered; that would be the warrant of arrest and the court order. He says that he told his wife to find out whether they were genuine and he says that she went to the attorney and the attorney verified it. The

respondent indicated that no one in his family could make an effort to get these documents authenticated because they were very busy with work.

The respondent offered some testimony regarding these two particular documents. He said that he only got a copy of the warrant. His wife sent it to him when another person from Bangladesh, named Shabor, was coming to the United States. The respondent believes that he got this document in June of 2003 from Shabor. At the same time, he also got the court order.

The respondent testified that he had never seen the original of the court order. He says that he got a court order of it from Shabor, the same time he got the warrant. He says that he does not remember exactly when he got it but he thought that it was June of 2003. After he got these documents, he gave them to his attorney.

The respondent has also offered a letter from his daughter. The Court notes that the letter from the daughter gives no specific information about how the documents were issued or obtained or given to one of the family members in Bangladesh.

The Court finds in this particular case that the respondent should authenticate its documents. The Court also believes that it would be reasonable to expect him to do so. The burden is on the respondent to establish that documents are genuine. The respondent has offered no evidence regarding the genuineness of these documents. In fact, they are rather questionable.

The respondent indicated quite clearly that he never saw the original of the Court order, though I have the original of that document in my file. When he was confronted with this, he indicates that he made a mistake, that he did not understand the question and that he, in fact, had seen the original.

The Court also notes that the respondent has indicated that he received these documents in June 2003, that would have been about two months before they were issued.

The respondent has offered letters from family members, his wife, his mother, etcetera. None of these letters offer any information regarding these two important documents that the respondent has offered but has failed to authenticate. The Court notes that several other documents have been offered, including mostly letters from persons who allegedly were present or knew of the respondent's arrest in 1991. There is no indication that these documents were not available at the time of the respondent's hearing in 1998 for asylum.

The Court finds that these documents could have been obtained by due diligence. The Court finds that the respondent's waiting from 1999 to 2006 to obtain these documents does not constitute due diligence. He has offered no explanation for why they could have been presented.

The Court finds that his reason that he could not get the documents authenticated is not reasonable. The business of his family certainly is not grounds to excuse authentication of foreign documents,

particularly when there are so many questions regarding their authenticity.

The Court also notes that at his hearing in 1998, the Court found that the respondent's testimony was not credible or reliable. Given this consideration, the Court finds that it is incumbent upon the respondent to establish that the documents are, in fact, genuine documents. The respondent has offered no convincing explanation for why he could not do so.

Accordingly, the Court finds that the respondent has failed to meet his burden of demonstrating that his Motion to Reopen should be granted because of changed circumstances. As the Board indicated, it is his second motion and it is out of time. The respondent has not established any changed circumstances in Bangladesh, which would warrant the reopening of his case.

The Court also notes that his Motion to Reopen should be denied as a matter of discretion.

The respondent was given a period of voluntary departure. He did not comply with that order. The Court finds that the respondent's failure to depart the United States after agreeing to do so is a very serious adverse factor.

In accordance with the above findings, the above order will be entered:

ORDER

IT IS ORDERED that the respondent's Motion to Reopen is hereby denied.

BARBARA A. NELSON
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE BARBARA A. NELSON, in the matter of:

BELAL AHMED CHAUDHARY
A 73 577 947
New York, New York

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/Susan Aiello
Susan Aiello, Transcriber

Free State Reporting, Inc.
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Annapolis, Maryland 21401
(301) 261-1902

January 29, 2008
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

08-3900-ag

[Filed September 18, 2009]

BELAL AHMED CHAUDHARY, Petitioner,	)
v.	)
ERIC H. HOLDER JR.,* UNITED STATES ATTORNEY GENERAL, Respondent.	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of September, two thousand nine.

PRESENT:

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder Jr. is automatically substituted for former Attorney General Michael B. Mukasey as respondent in this case.

WILFRED FEINBERG,
BARRINGTON D. PARKER,
RICHARD C. WESLEY,
Circuit Judges.

Belal Ahmed Chaudhary having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/Frank Perez
Frank Perez, Deputy Clerk